HEW SOOK YING

v.

HIW TIN HEE

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
MOHD. JEMURI SERJAN CJ (BORNEO)
HARUN HASHIM SCJ
[CIVIL APPEAL NO. 02-370- OF 1990]
2 APRIL 1992

LAND LAW: *Caveat - Filed by managing director of company in his personal name - Caveator's claim - Allegation that purchase of property is moneylending transaction and fraud against company by appellant/purchaser and one or two company's directors - Land sold to appellant by company - Transfer Form 14A executed by two company's directors in favour of appellant - Application by appellant to remove caveat - Question of respondent's caveatable claim - Absence of resolution of board of directors to challenge validity of sale of property to appellant by company - Whether managing director entered caveat to protect his own personal interest.*

COMPANY LAW: *Limited company incorporated under Companies Act - Whether limited company and individuals forming company are distinct legal entities - Distinction between company and its officers and shareholders - Fiduciary relationship of managing director with company - Whether a company director is a trustee for the company or has a fiduciary duty to the company.*

This was an appeal against the decision of the High Court which dismissed the appellant's application for the removal of the caveat under s. 327 of the National Land Code.

The main issue for determination in this appeal was whether the learned Judge was correct in dismissing the appellant's application and thereby allowing the caveat to remain.

Held:

[1] The appellate Court found that the respondent has no caveatable claim to title or registrable interest under s. 323(1)(a) or (b) of the National Land Code.

[2] Once the company has executed the instrument of transfer in Form 14A in favour of the appellant purchaser and handed the original document of title, the managing director either as an officer of the company or in his personal capacity as a shareholder has no fiduciary duty to challenge the conduct of the company by means of a private caveat for the alleged purpose of protecting his own interest or the interest of other shareholders.

[3] In any event, under s. 114(f) Evidence Act, the Court is entitled to presume that the common course of business in the company has been followed in this particular transaction.

[4] The appeal is accordingly allowed and the caveat should be removed and damages to be assessed by the High Court.

[Appeal allowed with costs caveat ordered to be removed. Damages to be assessed. Deposit paid for appeal refunded to appellant.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG TANAH: *Kaveat - Telah dimasukkan oleh pengarah urusan syarikat di atas namanya sendiri - Tuntutan pengkaveat - Dakwaan yang pembelian harta adalah transaksi pinjaman wang dan fraud terhadap syarikat oleh perayu/ pembeli dan seorang atau dua pengarah syarikat - Tanah dijual kepada perayu oleh syarikat - Borang pindah milik 14A disempurnakan oleh dua pengarah syarikat untuk perayu - Permohonan oleh perayu untuk menepikan kaveat - Persoalan yang melibatkan tuntutan kaveat responden - Ketiadaan resolusi lembaga pengarah untuk mencabar kesahihan penjualan harta kepada perayu oleh syarikat - Samada pengarah urusan memasukkan kaveat untuk mempertahankan kepentingan peribadinya.*

UNDANG-UNDANG SYARIKAT: *Syarikat berhad ditubuhkan dibawah Akta Syarikat - Samada syarikat berhad dan individu-individu yang menubuhkan syarikat adalah entiti Undang-Undang yang berlainan - Perbezaan di antara pemegang saham - Hubungan fidusiari pengarah syarikat adalah pemegang amanah untuk syarikat atau mempunyai kewajipan fidusiari terhadap syarikat.*

Inilah adalah rayuan terhadap keputusan Mahkamah Tinggi yang telah menolak permohonan perayu untuk menepikan kaveat dibawah s. 327 Kanun Tanah Negara.

Isu utama untuk penentuan di dalam rayuan ini adalah samada Hakim yang bijaksana telah bertindak betul dalam menolak permohonan perayu dan dengan itu membenarkan kaveat untuk berterusan.

Diputuskan:

[1] Mahkamah rayuan mendapati yang responden tidak mempunyai tuntutan yang boleh dikaveatkan atau kepentingan yang boleh didaftarkan di bawah s. 323(1) (a) atau (b) Kanun Tanah Negara.

[2] Bila mana syarikat telah menyempurnakan suratcara pindah milik dalam borang 14A bagi perayu/pembeli dan menyerahkan suratan hak milik asal, pengarah urusan samada pegawai syarikat atau dalam sifat personalnya (peribadi) sebagai pemegang saham tidak ada kewajipan fidusiari untuk mencabar tindakan Syarikat dengan cara Kaveat persendirian untuk tujuan seperti yang didakwa untuk melindungi kepentingan sendiri atau kepentingan para pemegang saham yang lain.

[3] Dalam sebarang keadaan, dibawah s. 114(f) Akta Keterangan, Mahkamah berhak untuk menganggap yang urusan biasa perniagaan di dalam syarikat telah diikuti didalam transaksi ini.

[4] Rayuan dengan ini adalah dibenarkan dan kaveat hendaklah diketepikan dan kerugian akan ditaksirkan oleh Mahkamah Tinggi.

[Rayuan dibenarkan dengan kos. Kaveat diperintahkan supaya diketepikan. Kerugian akan ditafsirkan. Deposit yang dibayar untuk rayuan dikembalikan kepada perayu.]

Cases referred to:

Tan Heng Poh v. Tan Boon Thong & 5 Ors. [1992] 1 CLJ (Rep) 316 ***(foll)***
Eng Mee Yong v. V. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Salomon v. Salomon & Co. Ltd. [1897] AC 22 ***(foll)***
Turnstall v. Steigman [1962] 2 QB 593 ***(foll)***
Regal (Hastings) Ltd.v. Gulliver & Ors. [1967] 2 AC 134 ***(foll)***

Re City Equitable Fire Insurance Co. Ltd. [1925] 1 Ch 407 ***(foll)***
Teoh Ai Choo v. Leong Sze Hian [1982] 2 MLJ 12 ***(dist)***
Royal British Bank v. Turquand [1856] 6 E & B 327 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 20
Evidence Act 1950, s. 114(f)
National Land Code 1965, ss. 210(3), 215, 323, 323(1), (a), (b), 326, 327, 340(2)

For the appellant - Low Hop Bing; M/s. Low Hop Bing & Associates
For the respondent - Murthi; M/s Murthi & Partners

JUDGMENT

Mohd. Azmi SCJ:

The appellant is one of the purchasers of new terrace houses in Semenyih, developed by Hew Brothers Holding Sdn. Bhd. (hereinafter referred to as "the company"), of which the respondent is the managing director. The land - the subject matter of the present dispute on which the house stands, is held under GM No. 422 [formerly HS(M) 1364A] No. PT 4022 Mukim of Semenyih. Due to the private caveat entered by the respondent on the said land, the appellant is prevented from registering the instrument of transfer as required under the National Land Code for the purpose of conveying the land title from the company to her. She therefore applies to the High Court for the removal of the caveat under s. 327 of the NLC. Her application by originating summons was dismissed on 10 August 1989. In the circumstances, the main issue for determination in this appeal is whether the learned Judge is correct in dismissing the application and thereby allows the caveat to continue. The value of the property being less than RM100,000 leave to appeal was granted by the learned Judge on 8 August 1990.

According to the appellant, on 30 March 1987 she purchased the property at the price of RM35,000 from the company *vide* a Pacific Bank Cheque No. 091197 for which she was issued with an official Receipt No. 1433 by the company (see "Exhibit HSY1"). On the said date, the company through two of its directors executed an instrument of transfer in Form 14A of the NLC in favour of the appellant, which was attested by an advocate and solicitor in the person of Mr. Kong Kim Leng. (see Exhibit "HSY2"). Prior to the presentation of the instrument of transfer for registration, a land search was made and showed the existence of the private caveat entered by the respondent on 29 July 1987 under Presentation No. 461/87 Jilid 31 Folio 51. On 6 July 1988, the appellant through her solicitors, Messrs. Kong Kim Leng & Co., wrote to the respondent requesting him to remove the caveat within seven days as the property had been lawfully purchased by the appellant from the company who was the registered owner. The letter was copied to the company. Despite the said demand, the respondent refused to remove the caveat, which resulted in the filing of the originating summons dated 6 August 1988.

Under s. 323(1) NLC:

> The person or bodies at whose instance a private caveat may be entered are:
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
>
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in para. (b).

This Court has recently paraphrased this section in *Tan Heng Poh v. Tan Boon Thong & 5 Ors.* (SCCA 02-228 of 1991) see [1992] 1 CLJ (Rep) 316.

Counsel for the appellant Mr. Low Hop Bing contends before us that in the first place the respondent cannot bring himself under s. 323(1) NLC and therefore he has no *locus standi* to enter the caveat. To this argument Mr. Murthi for the respondent argues that for the removal of the caveat it is for the appellant to show that she is a *bona fide* purchaser and it is for her to bring an action for specific performance of any sale agreement against the company, and consequently he says the learned Judge is correct in allowing the caveat to continue. If the originating summons had been allowed, so the argument goes, the respondent would be left without a remedy as the appellant would be able to dispose of the property in the meanwhile. Mr. Murthi has brought our special attention to the respondent's allegation that the purchase of the property is in reality a moneylending transaction and is a fraud against the Company by the appellant working in league with one or two of the company's directors. In his affidavit affirmed on 18 April 1989, the respondent alleges in para. 8 that the appellant "was a party to the fraud to cheat the shareholders of the company" (see p. 22 of the Appeal Record). In summary, the affidavit contains allegation that in reality what the appellant did was to give a loan of RM35,000 to one of the directors of the company, and the instrument of transfer was deposited with the appellant as a sort of security for the said loan. When the director failed to make any repayment, the appellant fraudulently used the instrument of transfer as if she had purchased the land. The allegation is based mainly on the fact that there is no sale and purchase agreement; that he as the managing director of the company never received the purchase money; that the price of RM35,000 is suspiciously paid by cash cheque to the unidentified director who issues a forged receipt; and that the RM35,000 paid is in any event strangely far below the market value of the property which according to the valuation of the land office as evidenced by stamp duty is RM96,000. The learned Judge would appear to have accepted these facts as constituting serious issues or questions to be tried, justifying the continuation of the caveat. Thus, in the concluding paragraph of his written judgment, the learned Judge said:

> Saya berpendapat bahawa soalan-soalan ini haruslah dijawab oleh plaintif untuk menentukan samada satu perkiraan jualbeli telah benar-benar berlaku. Bagi maksud itu perbicaraan haruslah diadakan ke atasnya. Saya juga berpendapat pihak plaintif perlulah membuat suatu tuntutan writ untuk menentukan isu-isu ini. Saya memutuskan oleh itu bahawa permohonan untuk mengenepikan kaveat ini ditolak dengan bayaran kos.

In an application to remove a private caveat under s. 327 NLC the principle laid down by the Privy Council in *Eng Mee Yong & Ors. v. V Letchumanan* [1979] 2 MLJ 212 has been consistently applied by the Courts in this country. In order to succeed the caveator must establish two ingredients, failing which, the caveat will not be allowed to continue. At p. 215, Lord Diplock has this to say:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat; he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

But earlier on, in explaining why the Privy Council had deliberately refrained from speaking of "onus of proof", His Lordship had also envisaged the difficulty of applying the above-mentioned principle where the person or body applying for removal is not the registered proprietor. Thus, Lord Diplock had this to say at p. 215 left column:

> Whereas the procedure under s. 326 for obtaining the removal of a caveat is available only to the caveatee, the procedure for applying directly to the Court for an order of removal is available not only to the caveatee but also to any other person aggrieved by the existence of the caveat - typically a purchaser to whom the registered proprietor has contracted to sell the land but the sale has not yet been completed by a proper instrument of transfer duly registered. In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (that is, the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the Court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under s. 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under s. 326 and what he must establish to defeat the caveatee's application for removal of the caveat under s. 327.
>
> It is otherwise when the applicant under s 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established make him aggrieved by the existence of the caveat.

The application for removal in the present appeal is a bit unusual in that the applicant is not the registered proprietor, and the caveat to be removed is entered not in the name of the company as a registered proprietor but in the personal name of the respondent, a third party. The caveator is not the typical purchaser but on the contrary it is the purchaser who is applying for the removal of the caveat entered by the third party. In our opinion the real dispute is not between the appellant purchaser and the company as registered proprietor but is between the appellant and the respondent who as the managing director is unhappy with the sale transaction carried out by the directors. As a managing director, he feels he has a duty as a trustee to protect the interest of the shareholders against any misdeed of the directors.

The problem in this case is to identify the caveator's claim to title or registrable interest in the land under s. 323(1) NLC. What is his caveatable claim? Although Mr. Murthi, the Counsel for the respondent has submitted at length both here and in the Court below that the respondent managing director enters the caveat as a trustee for the company, he has also submitted that the caveator so acted as a managing director on the instruction of the board of directors as deposed in paras. 8 and 11 of his affidavit sworn on 18 April 1989 which reads:

> 8. In the premises the plaintif was a party to the fraud to cheat the shareholders of the company.
>
> 11. I as the managing director of the company have been authorised by the board to lodge the caveat to protect the interest of the company.

On this issue there appears to be material contradiction between the caveator's affidavit and his previous statements made in Form l9B NLC, not only on his capacity in entering the caveat but also the ground for which it is entered. The absence of the board's resolution before the Court makes the task of resolving the contradiction even more difficult particularly when the caveat is not expressly entered in the name of the company. The contemporaneous document in Form 19B does not support the respondent's assertion in his affidavit that the caveat is lodged by him as a managing director to protect the interest of the company, but is expressly for the purpose of protecting his own personal interest, possibly as a shareholder.

The address given in the document, *viz*. "No. 147, Kampong Jaya Semenyeh" is not the address of the company and nor did he sign the document in his capacity as managing director. To add to the confusion is the argument in oral submission referred to earlier that as a managing director, he enters the caveat as a trustee for the company and thereby bringing his case under s. 323(1)(b) as a person claiming to be beneficially entitled under a trust affecting the disputed land.

From Form l9B (see Exhibit "HSY11" at p. 38 of Appeal Record), it is clear that the caveat is entered by the respondent under s. 323 for the express purpose of protecting his personal interest. This is obvious from the Attestation Clause in the application for entry of the caveat which constitutes the ground of the application. It states:

> Saya adalah salah seorang Pengarah di Syarikat Perumahan Hew Hee Bros. Holdings Sdn. Bhd., Pemilik berdaftar keatas Tanah-Tanah GM 396.397.400.40l.402.44l dan 451 Mukim Semenyih.
>
> Sebagai melindungi **kepentingan saya** keatas tanah-tanah berkenaan, maka saya memohon satu Kaveat dimasukkan sebagai mengikat Tanah/Kepentingan tersebut.
>
> (Emphasis supplied)

In his written judgment the learned Judge is of the opinion that the respondent as a managing director has the right to enter the caveat for the company. But the learned Judge apparently failed to go one step further and decide on the documentary evidence whether he did so for the company. But the learned Judge apparently failed to go one step further and decide on the documentary evidence whether he did so for the company or for his own interest either as an officer of the company or as a shareholder. If the learned Judge had critically considered the Attestation Clause in Form 19B, he would have found that the entry of the caveat is expressly for the purpose of protecting the respondent's own interest. Indeed, as stated earlier the caveat itself is entered in his personal name. We agree with Mr. Low Hop Bing for the appellant that the learned Judge has erred in law and in fact in failing to distinguish the legal entity between the company and its officers and shareholders. In entering the caveat in his own name for the purpose of protecting his own personal interest, it can only mean that he has done so as a shareholder or on behalf of all shareholders of the company. In view of the ambiguity and material inconsistency between what is expressly stated in Form l9B and his affidavit evidence, the board resolution ought to have been produced to show that he has the necessary authority to challenge the validity of the sale of the property to the appellant by the company. This is particularly so in view of the letter dated 30 March 1987 from the company confirming the sale and forwarding the original document of title of the property to the appellant's solicitors for necessary registration. The letter reads:

> Hew Hee Bros. Holdings Sdn. Bhd.
> No. 3, 1st floor, Taman Semenyih,
> Semenyih, Selangor
> Tel: 338288, 338344
>
> M/s. Kong Kim Leng & Co.
> No. 5, 1st floor
> Jalan Sulaiman
> Kajang.
>
> 30 March 1987

Dear Sir,

Property: HS(M) 1364A P.T. No. 4022
Mukim of Semenyeh

Purchaser: Mr. Hew Sook Ying
I/C No. 6236320

With reference to the above, we would like to confirm that the abovenamed purchaser has fully settled the purchase price of the above mentioned property.

Forward herewith is the original document of title for the necessary registration of the transfer.

Please be assured of our assistance always.

Yours faithfully,
sgd.

On the undisputed documentary evidence, we are satisfied that the company being the registered proprietor of the property is not the caveator. In our opinion the appellant is entitled to rely not only on the memorandum of transfer, but also on the original document of title and other documents in her possession to show her registrable interest in the land as a purchaser for purpose of registration under s. 215 NLC. But the respondent either as a managing director or in his personal capacity as a shareholder has nothing to rely on except his mere allegation of fraud and moneylending activities against unnamed directors. It is important to observe that neither the respondent, nor the company has filed any Court action against the appellant or against any of the directors for the alleged fraud on the company or its shareholders.

In our opinion as between the applicant/purchaser and the caveator/third party, to establish a caveatable claim to title or registrable interest in land under s. 323(1) NLC, it is essential for the caveator to have a claim filed or to be filed within reasonable time for adjudication. It is only on this basis that the principle enunciated in *Eng Mee Yong* can be applied. Consequently, on an application for extension or to set aside the caveat, it is incumbent on the caveator to satisfy the Court that he has such a claim before he proceeds to show that his said claim to title or registrable interest does raise a serious question or issue to be tried, and further on balance of convenience it would be better to maintain the *status quo* pending the trial of the action.

Thus, for the caveat to continue in the instant case, the learned Judge ought to have considered in the first instance whether as against the *prima facie* purchaser, the respondent as a third party caveator has satisfied the Court that he has a caveatable claim to title or registrable interest in the land under s. 323(1), before proceeding to direct his mind on the existence of serious question to be tried arising from such claim and the issue of balance of convenience.

At p. 3 of his written judgment, the learned Judge listed 4 matters as serious issues on the question of the *bona fide* of the sale, as if there were pending action filed or to be filed by the caveator against the appellant in which these issues could be tried for final determination. In our view on the facts of the instant case, the learned Judge fell into error in reversing the principle laid down in *Eng Mee Yong* by placing the duty to satisfy the Court for the continuation of the caveat on the appellant/purchaser instead of the respondent/caveator. He has also failed to bear in mind that in reality the respondent's alleged claim against the appellant is for fraud in the land transaction and not a claim to title or registrable interest in the land as envisaged by s. 323(1) NLC. Until today no action is contemplated against the

appellant, and as such in allowing the caveat to continue, its real effect is merely to allow the respondent as a managing director or as a shareholder to frustrate the registration of an instrument of transfer already executed by the company through its directors in a manner authorised by its constitution. Under s. 210(3) NLC, such an instrument shall, in favour of any purchaser be deemed conclusively to have been duly exercised by the company. In the face of this instrument of transfer in Form 14A, the onus is undoubtedly on the respondent to prove fraud. The learned Judge has therefore erred in law when he apparently concluded that it is for the appellant to prove the absence of fraud and that she is a *bona fide* purchaser.

It is a well established principle of law that a limited company incorporated under the Companies Act and the individuals forming the company are distinct legal entities, however complete in control right be by one or more individuals of the company [see *Salomon v. Salomon & Company Ltd.* [1897] AC 22]. [See also *Tunstall v. Steigman* [1962] 2 QB 593]. Any departure from a strict adherence of the principle has only been made to deal with special circumstances where a limited company might well be a facade concealing the real facts behind the corporate veil.

In this appeal, we must not lose sight of the fact that the company is the registered proprietor of the land under caveat, and it is the company that sold the property to the appellant at a price of RM35,000. The company has in fact handed to the appellant not only the instrument of transfer but also the document of title for necessary registration. In such circumstances, it is impossible to envisage how the managing director either personally or as a shareholder or as an officer of the company, can be said to have a caveatable claim to title or registrable interest under s. 323(1) merely because of internal squabbles between him and certain directors of the company.

The fiduciary relationship of a managing director with the company must be distinguished from his fiduciary duties. A company director is not a trustee but has fiduciary duty to the company. (See *Regal (Hastings) Ltd. v. Gulliver & Ors.* [1967] 2 AC 134). Thus, in *Re City Equitable Fire Insurance Co. Ltd.* [1925] 1 Ch. 407 @ 426-430 Rommer J had this to say:

> It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the Company, the statement is true enough.
>
> But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading.

Further, even assuming for one moment that the caveator had a cavetable claim to title or registrable interest, he should not delay in filing his claim in Court on the alleged claim. In the Singapore case of *Teoh Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12, it was held that delay is fatal where at the hearing of an application to remove the caveat no writ was yet filed. In the present case Mr. Murthi, admits that the respondent does not intend to file any action either now or in the future. As indicated earlier, the respondent has taken a hazardous position on the mistaken belief that the duty is not on him as a caveator but on the appellant to satisfy the Court the necessary ingredients laid down in *Eng Mee Yong*. For reasons already discussed, the learned Judge has erred in law in requiring the appellant instead of the respondent to file a writ, when he dismissed the application to remove the caveat.

In conclusion, it is our opinion that the respondent has no cavetable claim to title or registrable interest under s. 323(1) (a) or (b) NLC. Further, once the company has executed the instrument of transfer in Form 14A in favour of the purchaser, and handed the original document of

title the managing director either as an officer of the company or in his personal capacity as a shareholder has no fiduciary duty to challenge the conduct of the company by means of a private caveat for the alleged purpose of protecting his own interest or the interest of other shareholders. In the present circumstances, it is unreasonable for the managing director to challenge the *bona fide* of the sale without first resolving the matter either in the boardroom of the company, or at the floor of its general meeting. In any event, under s. 114(f) Evidence Act, the Court is entitled to presume that the common course of business in the company has been followed in this particular transaction. Further, the principle laid down in *Royal British Bank v. Turquand* [1856] 6 E & B 327 is that a person dealing with a company does not need to enquire into the regularity in the internal affairs and proceedings of the company, and may assume that all being done regularly. Section 20 of our Companies Act 1965, also provides that no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance as transfer. It is not true that the respondent would be without any remedy once the caveat is removed. Notwithstanding the principle of indefeasibility of title, there is nothing to stop the respondent from suing the appellant and the relevant directors for the alleged fraud and if necessary to challenge and caveat the title of the appellant by virtue of s. 340(2) NLC even after the instrument of transfer has been registered.

The appeal is accordingly allowed with costs both here and in the Court below. The caveat should be removed and damages to be assessed by the lower Court. The deposit paid for this appeal is to be refunded to the appellant.

Also found at [1992] 3 CLJ 1325